IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Nos. [redacted] 76-1755

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

NEWBURG AREA COUNCIL, INC., JOHN E. HAYCRAFT, et al. - - Respondents

L. J. HOLLENBACH III, County Judge - Intervenor

(Other parties respondent on inside cover)

SUPPLEMENTAL BRIEF

JOHN A. FULTON
WILL H. FULTON
2510 First National Tower
Louisville, Kentucky 40202

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioners, Board of Education of Jefferson County, Ky. and Superintendent Ernest Grayson

Of Counsel:
WOODWARD, HOBSON & FULTON

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

Additional Respondents in Board of Education of Jefferson County v. Newburg:

Sarah White, Johnie Wright, Suzanne Post, Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County v. Haycraft:

Board of Education of Louisville, Ky., Hazel K. Lane, Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, Louisville and Jefferson County Federation of Teachers, Local 671, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

INDEX

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Nos. 76-710 and 76-1755

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and
ERNEST GRAYSON, Superintendent - - *Petitioners*

v.

NEWBURG AREA COUNCIL, INC.,
JOHN E. HAYCRAFT, ET. AL. - - - *Respondents*

L. J. HOLLENBACH III, County Judge - *Intervenor*

(Other Parties Respondent on inside cover)

MOTION TO CONSOLIDATE

Come the Board of Education of Jefferson County, Kentucky and Ernest Grayson, Superintendent, by counsel, and move this Court to consolidate the Petitions for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Nos. 76-710 and 76-1755, for consideration in light of this Court's decision in *Dayton Board of Education* v. *Brinkman*, —— U. S. —— (1977), 97 S. Ct. 2766. The Movants further pray that this Court grant the consolidated petitions for writ of certiorari to the United States Court of Appeals for the Sixth Circuit, vacating the decisions of such court as set out in the petitions, as supplemented, and re-

manding this matter for further consideration in light of *Dayton* and this Court's landmark decision in *Washington* v. *Davis*, 426 U. S. 229 (1976).

JOHN A. FULTON
WILL H. FULTON
2510 First National Tower
Louisville, Kentucky 40202

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioners, Board of Education of Jefferson County, Ky. and Superintendent Ernest Grayson

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Nos. 76-710 and 76-1755

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - - *Petitioners*

v.

NEWBURG AREA COUNCIL, INC., JOHN E. HAYCRAFT, ET. AL. - - - *Respondents*

L. J. HOLLENBACH III, County Judge - *Intervenor*

(Other Parties Respondent on inside cover)

SUPPLEMENTAL BRIEF

I. STATEMENT OF QUESTIONS PRESENTED

A. Does the admitted racial imbalance in the Jefferson County School System evidence sufficient discriminatory intent to support a finding of unconstitutional state action?

B. Where there has been no finding of a system-wide impact on racial balance by alleged state action, can massive system-wide busing nevertheless be imposed?

C. Can a Court of equity impose a degree of racial balance in excess of that which would have resulted but for the alleged unconstitutional state action?

D. Is the remedial imposition of a particular degree of racial balance constitutionally justifiable?

II. STATEMENT OF THE CASE

These cases arise out of desegregation litigation concerning the Louisville, Kentucky metropolitan area. The petitions for writ of certiorari, timely filed during the October, 1976 Term, set out in detail the procedural history of these cases.

The present petitions for writ of certiorari both arise out of the desegregation order of the District Court entered on July 30, 1975. The Petitioner in No. 76-710, Board of Education of Jefferson County, Ky. (Board of Education), was charged with the implementation of such desegregation order. The Intervenor-Petitioner (No. 76-1755), L. J. Hollenbach, County Judge, intervened in this matter on motion when the tremendous impact of the desegregation plan became evident.

The Court of Appeals approved the sweeping desegregation plan of the District Court in *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976). The Board of Education timely filed its petition for writ of certiorari directed specifically at this decision of the Court of Appeals. However, on January 21, 1977, the Board of Education filed a supplemental brief in light of this Court's decision in *Austin Independent School District* v. *United States*, 429 U. S. 990 (1976), asking that this Court also reconsider the initial decision of the United States Court of Appeals for the Sixth Circuit delineating the existence of a constitutional violation. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973), *vac. on other grounds*, 418 U. S. 918 (1974).

The Board of Education's petition was denied by this Court without comment. *Cunningham, supra, cert. den.*, —— U. S. —— (1977), 97 S. Ct. 812. The Board of Education subsequently filed a timely petition for rehearing in light of this Court's contemporaneous grant of certiorari in the *Dayton* case. The petition for rehearing was denied. *Cunningham, supra, reh. den.*, —— U. S. —— (1977), 97 S. Ct. 1573.

Petitioner Hollenbach intervened in the desegregation litigation both at the district court level and in the Court of Appeals for two apparent reasons. First, to support the substantive position of the Board of Education with respect to the plan of desegregation of the District Court affirmed in *Cunningham, supra,* and secondly, to submit to the District Court an Alternative Plan of Desegregation considerably narrower than the plan adopted by the District Court but nevertheless specifically designed to meet the standards enunciated by this Court. Judge Hollenbach was given a cursory opportunity to begin the presentation to the District Court of his Alternative Plan, but he was summarily dismissed as a party by the District Court upon its determination that such plan would not eradicate *racial imbalance* in the Jefferson County, Kentucky schools.

The United States Court of Appeals for the Sixth Circuit dismissed, on motion, the appeal prosecuted from the district court by Judge Hollenbach, relying upon this Court's denial of certiorari in *Cunningham, supra,* (No. 76-710).

After this Court's decision in *Dayton,* the Board of Education filed before the close of the October 1976

Term its motion to allow the filing of a petition for rehearing in light of the holding in *Dayton*. That motion is still pending before the Court. On August 16, 1977, County Judge Hollenbach filed a supplemental brief in support of his petition (No. 76-1755) analyzing the considerable impact of the *Dayton* decision on his petition for certiorari. In such supplemental brief County Judge Hollenbach requested additional procedural relief substantially similar to the relief sought by the Board of Education in No. 76-710.

This motion to consolidate and brief in support are filed by the Board of Education by way of response to the letter of this Court's Clerk of September 6, 1977 directing counsel for the desegregation plaintiffs to file a response to the petition for certiorari and supplemental brief in No. 76-1755.

III. REASONS FOR CONSOLIDATION AND GRANTING THE WRIT

The petitions for writ of certiorari to the United States Court of Appeals for the Sixth Circuit (Nos. 76-710 and 76-1755), as supplemented in both cases, concern identical substantive questions in their present procedural posture. Specifically, the questions which this Court must resolve in its consideration of the petitions are whether or not the Court of Appeals correctly applied the constitutional standards enunciated in *Washington* v. *Davis* and *Dayton* in determining both the existence of unconstitutional state action and the nature and extent of the remedy required to eliminate the vestiges of any such impermissible activity.

County Judge Hollenbach also raises the ancillary issue in his petition of the constitutional propriety of his Alternative Plan. That issue cannot be reached, however, until the preceding decisions of the Court of Appeals are scrutinized in light of *Washington* v. *Davis* and *Dayton*. The propriety of *any* specific remedy cannot be placed in proper perspective until the Court of Appeals' initial reversal of the District Court's finding (that no constitutional violation existed) is thoroughly re-examined in light of this Court's recent decisions.

During the October 1976 Term this Court by its decisions in *Austin* and *Dayton* confirmed the application of the rationale of *Washington* v. *Davis* to desegregation litigation. These decisions concerned both the proper standard for the determination of the existence of a constitutional violation and the questions involved with the fashioning of a desegregation remedy designed to eliminate the vestiges of unconstitutional state action.

In these consolidated actions this Court is again confronted with both the determination of a violation and the fashioning of a remedy for any such violation. The reason for the duplicity of these issues in all these cases flows directly from the utilization by the courts of appeals therein of an improper standard for the determination of a constitutional violation *ab initio*. Both the United States Court of Appeals for the Fifth Circuit in *Austin* and the United States Court of Appeals for the Sixth Circuit in *Dayton* (and in these cases) have erroneously equated the mere presence of *racial imbalance*, without more, with unconstitutional

state action. As racial imbalance, from whatever cause, is the misconceived constitutional standard required by the courts of appeals, desegregation plans solely designed to attain racial balance with commensurate system-wide massive busing are the inevitable result.

As the courts of appeals have generally followed this Court's admonition that the nature of the violation determines the scope of the remedy [*Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 (1977)] this Court must now make an independent determination of whether or not the lower courts applied the appropriate standard for the determination of a constitutional violation initially where, as here, it has been determined that *racial imbalance* for whatever cause is unconstitutional *per se.* Here, as in *Dayton* and *Austin,* a system-wide massive busing remedy which strives solely and alone to attain a particular degree of racial balance represents the "fruit of the poisoned tree." It is no coincidence that the substantial societal restructuring required under such massive desegregation plans flows from the improper standard of racial balance required by the courts of appeals in these cases.

The unsound reasoning of the courts of appeals here, and in *Dayton* and *Austin,* illustrates the ultimate self-fulfilling prophecy. Racially imbalanced schools are deemed segregated and the "necessary" remedial plans are therefore designed specifically to eliminate racial imbalance. To repair the breach created by the lower courts through their misapplication of this Court's decisions in *Swann* and *Green* v. *County School Board of New Kent County,* 391 U. S. 430 (1968), all

cases such as these consolidated actions which are indistinguishable from *Dayton* and *Austin* must receive similar treatment at the hands of this Court. Please see *School District of Omaha* v. *United States,* —— U. S. —— (1977), 97 S. Ct. 2905 and *Brennan* v. *Armstrong,* —— U. S. —— (1977), 97 S. Ct. 2907. If this breach is not sealed completely, the application of *Washington* v. *Davis* to the school desegregation area in *Dayton* and *Austin* will be stripped of its significance and finality by attempts to distinguish what are for all relevant purposes identical cases.

A. The Presumption That the Mere Existence of Racially Imbalanced Schools, Without More, Is a Violation of the Fourteenth Amendment Conflicts With *Washington* v. *Davis*

For the purposes of this litigation the class action plaintiffs focused their interest on one primary sin allegedly perpetrated by the boards of education—the mere existence of racial imbalance in the schools operated by such school systems.[1]

Rather interestingly, plaintiffs made no claim that children in formerly all-black schools were subjected to sub-standard facilities or programs. The primary complaint of the plaintiffs was the racial identifiability of many schools resulting solely and alone from racial imbalances in the student population when compared

[1]Admittedly, criticism was made of teacher assignment patterns, but extensive teacher reassignment has now been undertaken and is not questioned by the Petitioners here. Additionally, the free transfer plan of the former Louisville school board has been drawn into issue. The undisputed finding of the District Court, however, reveals that the free transfer plan had no appreciable impact on pupil racial composition in any school (Addendum, p. 23a).

with the overall racial composition of the entire school system.

> We are proceeding in the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable. (Emphasis by the Court, quoting from the opening statement of counsel for the plaintiff in Civil Action No. 7291-G, Addendum, p. 7a).

As the thrust of the plaintiffs' theory of recovery in this matter is grounded on the now discredited proposition that racial imbalance alone is presumptive of a constitutional violation, it is not surprising that the Court of Appeals adopted such a purported constitutional standard in reversing the District Court's finding that the school systems involved were indeed unitary in nature in spite of their history of *de jure* segregation. In its original decision in this matter the Court of Appeals unquestionably based its reversal of the findings of the District Court on the "racial identifiability" in both the former City and the former County schools. For this purpose it equated "racial identifiability" with racial imbalance.

> A school system that has had a history of state-imposed segregation has not fully converted to a unitary system when 56% of all its black elementary students attend 3 out of 74 elementary schools. *Newburg, supra,* 489 F. 2d 925, 929.

This reference to the former Jefferson County school system is paralleled in the Court of Appeals' discussion

of the alleged violations by the former Louisville Board of Education.

> A large number of *racially identifiable* schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated. . . . Regardless of any explanation for the racial composition of any of the other schools in the system, the 35 pre-*Brown* schools that have retained their pre-*Brown* racial identification to the present day stand out as clear vestiges of state-imposed segregation. *Newburg, supra,* 489 F. 2d 925, 930-31. (Emphasis added.)

In essence the Court of Appeals has added an even more infirm corollary to the proposition that the mere existence of racial imbalance is presumptive of a constitutional violation. The Court of Appeals has placed an affirmative duty on any school board with a history of prior *de jure* segregation to utilize cross-district busing to attain racial balance whenever the application of a facially neutral geographic zone assignment plan in the presence of neighborhood racial isolation produces racially imbalanced schools.

> Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. *Newburg, supra,* 489 F. 2d 925, 931.

The point here, of course, is that it must "work" to produce *racial balance,* even though that is not a permissible goal for a desegregation remedy under the leading decisions of this Court.

In *Washington* v. *Davis* this Court clearly held that the state action requirement of the Fourteenth Amendment cannot be satisfied by a mere showing that some official act which is otherwise facially neutral merely has a disproportionate impact of some identifiable segment of the larger population in the absence of clear evidence of intent to discriminate.

> [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. . . . The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of Equal Protection Clause. *Washington* v. *Davis, supra,* 96 S. Ct. 2040, 2047-48. (Emphasis added.)

The significance of this constitutional standard is quickly shown in the school desegregation area where a school system has maintained a facially neutral geographic attendance zone assignment plan when racial isolation is present in the neighborhood residential patterns. Under such circumstances many schools in such a school system would of necessity be racially monolithic in character. The United States Court of Appeals for the Sixth Circuit has held in this matter that the Board of Education cannot adopt such a facially neutral assignment pattern in light of *de jure*

segregation prior to *Brown I. Newburg, supra,* 489 F. 2d 925, 930-31.

The adoption by this Court of the rationale of *Washington* v. *Davis* specifically discredits this crucial finding by the Court of Appeals concerning the nature of the alleged constitutional violation by the Board of Education.

> The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. . . . It is clear from the findings of the District Court that Dayton has a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Dayton, supra,* 97 S. Ct. 2772, 2774. *See also Austin, supra,* Powell concurring, discrediting the type of analysis which condemns *per se* the imposition of a racially neutral neighborhood school plan where it results in racially monolithic schools, 97 S. Ct. 517-518, fn. 1.

It should be noted that the District Court in the first instance *specifically* found that the racial imbalances in the schools operated by the Board of Education were due solely and alone to the imposition of an otherwise racially neutral neighborhood school assignment plan upon a typical metropolitan pattern of *residential* racial isolation over which the Board of Education had no control whatsoever (Addendum, pp. 24a, 31a-32a).

The Court of Appeals in reversing the District Court on the question of the existence of a constitutional violation did not disturb this crucial finding of fact by the District Court. Instead the Court of Appeals imposed a constitutional standard which has no support in the decisions of this Court to the effect that the utilization of such a neighborhood assignment pattern, without more, is a conclusive indication of unconstitutional state action.

Not only is such an analysis clearly in error on the question of the substantive law, it is also "important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Dayton, supra,* 97 S. Ct. 2766, 2770. *See also Dayton, supra,* at 2773. This glaring error alone is sufficient to support the reinstatement by this Court of the original decisions in these matters entered by the District Court on March 8, 1973.

B. A Desegregation Order Directing a System-Wide Remedy in the Absence of a Showing of a System-Wide Violation Must Be Vacated Under *Dayton Board of Education* v. *Brinkman*

A merger between the former Louisville Independent school system and the Jefferson County school system was effected under state law on April 1, 1975. The only findings on which a constitutional violation could be based in this matter, however came during the trial of these cases on the merits before the District Court in December, 1972. The desegregation order

adopted on July 30, 1975 by the District Court, however, almost exclusively involves the busing of white former County school students and black former City school students. This situation, of course, indirectly results from the Court of Appeals' insistence on a degree of racial balance which could only be attained by the exchange of such students.

The Court of Appeals has compelled a system-wide remedy in the absence of any finding whatsoever of a system-wide violation in clear conflict with this Court's decision in *Dayton* to the effect that "the remedy must be designed to redress that [incremental] difference [in racial distribution], and only if there has been a system-wide impact may there be a system-wide remedy. *Dayton, supra,* 97 S. Ct. 2766, 2775.

This pragmatic workable standard fits well within the cause/effect analysis utilized in many of this Court's recent desegregation decisions. It has been held that a finding must be made that the unconstitutional state action was specifically a substantial cause of the present alleged difficulty here: racial imbalance. Please see *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976), 96 S. Ct. 2697, 2704, *Swann, supra,* 402 U. S. 1, 31-32, *Milliken* v. *Bradley,* 418 U. S. 717, 744-745 (1974).

The cause and effect analysis of *Milliken, supra,* is indeed particularly appropriate in light of the rationale adopted by this Court in *Washington* v. *Davis* as specifically extended to desegregation cases by *Dayton.* In this matter the only *possible* inter-district (i.e., system-wide) state action which could conceivably support a

system-wide remedy would be the practice prior to *Brown I* of the Jefferson County Board sending all black high school students on a tuition basis to Central High School which was run at that time by the former Louisville school system. The District Court in this matter, however, specifically found that the actions of the Jefferson County Board subsequent to *Brown I* completely removed any system-wide vestiges resulting from such prior state action (Addendum, p. 10a). This unreversed finding of the District Court is based, at least in part, on the clear fact that the state action in connection with Central High School has no incremental effect whatsoever at the present time on the racial distribution in the school system and thus is eliminated as a system-wide cause of racial imbalance and putative basis for system-wide relief.

> "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, *or of a single school district* have been a *substantial cause* of inter-district segregation." *Milliken, supra,* 418 U. S. 717, 745. (Emphasis added.)

C. Under *Dayton* the Proponents of a Desegregation Plan Must Demonstrate That the Degree of Racial Balance Sought Thereunder Would Have Resulted *But For* the Unconstitutional State Action.

It is axiomatic in desegregation litigation that once a violation has been demonstrated, the nature of any such violation determines the scope of the violation. *Swann, supra,* 402 U. S. 1, 16. The difficulty with the desegregation orders imposed here and in *Austin* and *Dayton* is that they make no attempt whatsoever to be strictly proportional to the identified violations.[2] See *Dayton, supra,* 97 S. Ct. 2766, 2775, *Austin, supra,* 97 S. Ct. 517, 519, Powell concurring.

This Court has repeatedly recognized the difficulties of the trier of fact in attempting to ascertain the motives of public bodies. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, —— U. S. —— (1977), 97 S. Ct. 555. *Dayton, supra,* 97 S. Ct. 2766, 2772. Faced with the drastic over-utilization by the lower courts of massive wide scale busing in the absence of a correspondingly severe violation, this Court has now enunciated a pragmatic, workable standard to be applied when fashioning a school desegregation remedy.

Of necessity this standard involves *both* the nature of the violation *and* the scope of the remedy. It is particularly useful in appraising the actions of a large metropolitan school board against the background of

[2]This is due at least in part, no doubt, to the utilization of an incorrect constitutional standard for the determination of the existence of a constitutional violation at the outset as demonstrated hereinabove.

typical metropolitan neighborhood racial isolation. Please see *Austin, supra,* 97 S. Ct. 517, 519, Powell concurring.

> "The duty of both the District Court and of the Court of Appeals, in a case such as this, *where mandatory segregation* by law of the races in the schools *has long since ceased,* is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine *how much incremental segregative effect* these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." *Dayton, supra,* 97 S. Ct. 2766, 2775. (Emphasis added.)

Under this rationale, whenever a party proposes a remedy designed to effect a particular degree of racial balance, the proponent must establish that such degree of racial balance would have existed *but for* the proven constitutional violations. In the absence of such a limitation, any such remedy runs headlong into this Court's clear admonition against the elevation of a particular degree of racial balance to the level of a substantive constitutional right. *Swann, supra,* 402 U. S. 1, 23-24.

In his concurring opinion in *Austin,* Justice Powell also acknowledges the difficulty of fashioning a de-

segregation remedy for a large metropolitan school district, and suggests the following standard:

> "Thus, large-scale busing is permissible *only* where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children." *Austin, supra,* 97 S. Ct. 517, 519. (Emphasis added.)

The District Court apparently anticipated this standard and specifically found *in the first instance* that the Jefferson County schools reflected a pupil racial balance which is *less segregated* than the neighborhoods served by such schools (Addendum, p. 24a). This undisputed finding was *not* reversed by the Court of Appeals. The record in this matter would clearly support the reversal of the Court of Appeals' original decision and the reinstatement of the original decisions of the District Court of March 8, 1973. In the interest of procedural fairness, this Court may wish, however, to remand this matter to the District Court for further proceedings in light of *Washington* v. *Davis. Dayton, supra,* 97 S. Ct. 2766, 2775.

D. A Desegregation Plan Which Permits Only 5% Deviation From the Racial "Norm" Conflicts With *Swann* v. *Charlotte-Mecklenburg Board of Education* By Elevating Racial Balance to a Substantive Constitutional Right

A final major issue in this litigation has been again emphasized by this Court's decision in *Dayton*, by virtue of the Court's renewed condemnation of "racial balance" desegregation plans. *Dayton, supra*, 97 S. Ct. 2766, 2774. The Dayton plan called for racial balances in *every* school within 15% of the racial balance of the school system as a whole. *Ibid*, 97 S. Ct. 2766, 2769. While this plan was clearly disproportionate to the enumerated constitutional violations, it also impermissibly raises racial balance to the level of a substantive right in contradiction of this Court's decisions. *Swann, supra*, 402 U. S. 1, 24, 28, *Milliken, supra*, 418 U. S. 717, 740-741, *Pasadena, supra*, 96 S. Ct. 2697, 2705.

The desegregation order in this case is also completely disproportionate to the alleged violation, but equally significantly it is even more stringent in its demand for racial balance than either the *Dayton* plan or the *Austin* plan in two respects. First, the tolerances under the desegregation plan here are considerably narrower in application than those in *Dayton*. Only 20% of all schools are allowed to vary more than 5% from the "norm," and less than 2% vary by more than 10%. If the *Dayton* tolerances of 15% were used here it is probable that less than half of the 23,000 pupils

bused under the present plan would require similar reassignment.

The Jefferson County plan more clearly reflects its impermissible goal of racial balance through its provision for perpetual realignment of the schools to insure their ongoing racial balance even after the implementation of the plan. This provision strips the Fourteenth Amendment of its state action component, but it also shows that the goal of the plan is to achieve a particular preconceived degree of racial balance rather than the mere elimination of the vestiges of state imposed segregation. *Swann, supra*, 402 U. S. 1, 31-32, *Austin, supra*, 97 S. Ct. 517, 518 fn. 3.[3]

[3]It should be finally noted that the District Court *has* implemented the perpetual realignment aspect of its desegregation plan by directing an additional remedy in the absence of *any* inquiry into the cause of the "imbalance." The Court of Appeals has already distinguished that action from the rationale of *Pasadena* on the ground that the schools never reached the proscribed racial balances. *Haycraft* v. *Board of Education of Jefferson County, Kentucky*, Slip Opinion, 6th Cir., 8-23-77, p. 3; Addendum, p. 34a.

IV. CONCLUSION

The petitions for certiorari, *in their present posture,* present substantial, essentially similar issues of considerable national importance which are of unquestioned significance to all children attending the public schools in Jefferson County and their families. *Austin, supra,* 97 S. Ct. 517, 519 fn. 7. The lower courts in this matter have misconstrued the decisions of this Court both with respect to the proper determination of a constitutional violation and the principles inherent to the creation of a remedy in an identical fashion to that of the lower courts in *Austin* and *Dayton.* As these cases are indistinguishable on all substantive issues, the result must be the same in order that *Austin* and *Dayton* will receive the significance and finality they demand. *See Omaha, supra,* and *Brennan* v. *Armstrong, supra.*

It is the position of the Board of Education that these petitions should be consolidated and summarily disposed of by this Court by reversal of the decisions below in the Court of Appeals and reinstatement of the original decisions of the District Court wherein the school system was held to be unitary (Addendum, pp. 1a-33a). In the alternative, this Court should, at the very least, adopt a procedural posture identical to the action taken in *Dayton,* remanding this matter directly to the District Court for the taking of additional evidence on the question of the existence of a constitutional violation in light of *Washington* v. *Davis.* This determination would be subject expressly to review by

the Court of Appeals. Only if an appropriately determined violation is found thereby would the fashioning of a remedy be required, and in no event would there be a system-wide remedy in the absence of a system-wide violation. *Dayton, supra,* 97 S. Ct. 2766, 2775.

Respectfully submitted,

JOHN A. FULTON
WILL H. FULTON
2510 First National Tower
Louisville, Kentucky 40202

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioners, Board of Education of Jefferson County, Kentucky and Ernest Grayson, Superintendent

Of Counsel:
WOODWARD, HOBSON AND FULTON

September 27, 1977

CERTIFICATE OF SERVICE

It is certified that three copies hereof were served by hand delivering same to Mr. Ben Talbott, Middleton, Reutlinger & Baird, 501 South Second Street, Louisville, Kentucky; Mr. J. Bruce Miller, Kentucky Home Life Building, Louisville, Kentucky; Mr. Henry A. Triplett, 231 South Fifth Street, Louisville, Kentucky; and Mr. Thomas Hogan, 701 West Walnut Street, Louisville, Kentucky, being all counsel required to be served. on 9-26-77

Will H. Fulton

JOHN A. FULTON—WILL H. FULTON

ADDENDUM

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville
Civil Action No. 7045

NEWBURG AREA COUNCIL, INC., Mrs. Sarah White, Mrs. Johnie Mae Wright and Mrs. Suzanne Post, - - - - - - - - - *Plaintiffs*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KY., a Body Corporate and Richard Van Hoose, Superintendent, Jefferson County Public Schools, - - - - - - - - *Defendants*

MEMORANDUM OPINION AND JUDGMENT—
Entered March 8, 1973.

The Pleadings and Issues

On August 27, 1971, Newburg Area Council, Inc., a community organization in the black Newburg community of Jefferson County, Kentucky and three citizens filed an action against the Jefferson County Board of Education and its Superintendent. The action purported to be a class action on behalf of persons so numerous as to make it impractical to bring them before the Court and claimed that prior to 1955 the Board of Education of Jefferson County, in accordance with state law, maintained a racially segregated school system with white pupils and teachers assigned to certain schools and black pupils and teachers assigned to other schools. Admitting that the Board undertook, following the decision of the *Brown* case, to desegrate the

school system, plaintiffs contended that the efforts of the Board have not been sufficient and that all vestiges of state imposed segregation had not been eliminated from the school system. The thrust of the Complaint was that the Board had created and redrawn attendance zones in such a way as to increase, rather than reduce, the degree of racial segregation and, in particular, it was complained that the Board had rebuilt Cane Run Elementary School in such a manner as to increase segregation. It was further complained that the Board continued to maintain Newburg Elementary School as an all black school and had constructed new schools and redrawn attendance lines in other surrounding areas in such a method as to increase rather than to reduce racial segregation. The Complaint sought a declaratory judgment determining that the Board was not operating the school system in accordance with the requirements of the Constitution and that the Board should be required to take further steps to convert the school system to a unitary system, eliminating all vestiges of state imposed segregation and that the Board be required to draw attendance lines, select school sites, and make decisions relative to the closing of schools and the hiring and assignment of teachers so as to achieve the greatest possible degree of integration in the schools. Specifically, the Complaint demanded that the Board be required to present a plan providing for the desegration of Newburg Elementary School, Bashford Manor Elementary School and Goldsmith Elemenatry School; that the attendance zones for Price Elementary School, Watterson Elementary School and Klondike Elementary School be redrawn; that the pupils be reassigned; that attendance zones for Cane Run Elementary School and Schaffner Elementary School be redrawn and that bus routes and busing assignments be changed to conform to the new attendance zones.

Finally, the complaint sought to require the Board to present a plan requiring the Board to recruit black faculty

members so that at least four percent of all teachers employed by the system were black and that black faculty members be assigned to schools in the same proportions as black pupils are assigned to a particular school and that by the 1972-73 school year the black-white teacher ratio *in each school* shall correspond to the black-white teacher ratio *in the entire system.*

The Board of Education filed a timely answer in which it set forth the statistics relative to the size of the school system and the fact that all students in the school system were required to attend the school which is located in the school attendance zone in which they live. The Board admitted that it had complied with the statutes of the Commonwealth of Kentucky and the rules and regulations of the Department of Education of the Commonwealth of Kentucky with reference to the assignment of Caucasion and Negro children *prior to 1955.* The Board alleged that beginning in 1955, following the decision of the Supreme Court of the United States in the *Brown* case, it had begun to formulate plans to desegregate the school system and thereafter began to discontinue schools whose student body was 100% Negro and completed the integration of all students in grades 7 through 12 and took additional steps in an effort to remove and eliminate from the Jefferson County School system all vestiges of state imposed segregation. The Board asserted that the Newburg Elementary School had remained a school whose student body was nearly 100% Negro becanse of the fact that the population living in the attendance Zone in which the school was located was primarily Negro. The Board further alleged that it had on several occasions redrawn attendance zones so that Negro students were diverted from the Newburg Elementary School to newly constructed elementary schools in the Newburg area which previously had a predominantly white population.

With reference to the Cane Run Elementary School, the Board maintained it to be a school that was constructed to replace an original building, that its occupancy was anticipated in September of 1972 and that surveys of the area indicated that the location was the best possible geographic location to serve the school children in the area. The Board denied that it had knowledge or projections or information that the population of the Cane Run Elementary School attendance zone would be predominantly Negro and contended that when Schaffner Elementary School was constructed, attendance zones were redrawn so that overcrowded facilities of Mill Creek and Cane Run Schools were partially relieved by Schaffner. Cane Run at this time had only 17 Negro pupils. The Board stated that since 1954, the pupil population of the system had increased by a total of 62,000 students, of which approximately 2400 were Negroes.

With reference to teachers employed in the system, the Board admitted that the ratio of Negro teachers employed was not identical with the ratio of Negro pupils to white pupils in the school system but alleged that every effort was being made to enlist Negro teachers and that efforts were being made to integrate the faculties of the various schools as far as possible.

On June 22, 1972, John Haycraft and Hazel Lane filed Civil Action 7291-G which was brought by them against both the Board of Education of Louisville and the Board of Education of Jefferson County. That action was sponsored by the Kentucky Civil Liberties Union and, in particular, demanded that the Court transfer that part of the Jefferson County school district which lies within the corporate limits of the City of Louisville to the Louisville Independent School District. Such complaint set forth numerous allegations against the Louisville Board of Education, contending that it was maintaining a dual school system and was not taking the necessary and appropriate steps required to accomplish a unitary system. With reference to the Jefferson

County Board of Education, the Haycraft suit adopted by reference and incorporated all of the allegations of the complaint in the Newburg Area Council suit. This complaint, like the Newburg Area Council complaint, sought a declaratory judgment that the Louisville Board was not operating the Louisville Independent School District in accordance with the requirements of the Constitution and had not undertaken to eliminate all vestiges of state imposed segregation. It was further contended that the failure of the Louisville Board and the Jefferson County Board to include within the Louisville school district all territory within the corporate limits of the City of Louisville, commonly referred to as the "fringe area" and sixth-class cities physically located within the incorporated boundaries of the City of Louisville was in violation of the Constitution. It was demanded that the two Boards be required to execute an agreement providing for the transfer to the Louisville Independent School District the area within the corporate limits of the City of Louisville not now included within said district.

Subsequently, in July of 1972, intervening complaints were permitted by the Court on behalf of individuals represented by attorneys for the Kentucky Commission on Human Rights and by the Louisville and Jefferson County Federation of Teachers, Local No. 672. These intervening complaints, which joined the Anchorage Independent School District with the Board of Education of Louisville and the Board of Education of Jefferson County, sought to require that the three school systems be *merged into one county-wide school system* as the only appropriate means of accomplishing complete integration of the school systems and the abolition of all vestiges of state imposed segregation. The intervening plaintiff, Louisville and Jefferson County Federation of Teachers, Local 672, joined in the prayer for relief, demanding that all three of the school systems within

the county be merged and in particular sought protective remedies for the welfare of the teachers within the various school systems. So much for the pleadings.

Threshold Orders of the Court

Prior to the trial hereof, we entered certain threshold orders in both cases, to the effect that this Court lacked the judicial powers to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage School Districts, and, since the Anchorage School District (a very small school district located in the Northeast portion of the county) was totally white, the Court, by final order with respect thereto, dismissed all proceedings against the Anchorage School District and its superintendent.

At the same time we directed separate trials, one immediately following the other, of the claims of all plantiffs against the Louisville Independent School District and then against the Jefferson County School District.

Succinctness dictates an explanation at this point as to our reasoning behind the aforementioned threshold orders.

First off, at that point in time (October, 1972), the prevailing law on the crossing of political boundaries in integration cases was as expressed in *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058. The Supreme Court of the United States had declined to advance that matter upon its docket. The Sixth Circuit had not spoken on the issue.

Though it has always been our personal judicial feeling that a situation might possibly be *envisioned*, wherein established discrimination was so *invidious* and *de jure* and further wherein the district court might be so *"locked in"* by existing political boundaries that its desegregation problem became *insusceptible of any solution other than* by the crossing of political boundary lines, that such might become legally acceptable; however, an examination by us of the pleadings in the instant matter and our knowledge of the

historical local situation did not support the possibility of proof of such a set of facts here, and, accordingly, we followed the Fourth Circuit rule. We believe our judgment in this regard was vindicated, for at commencement of trial renowned counsel for the plaintiffs stated his position in this Jefferson Board action to be the same as that taken in the immediately prior Louisville Board case, namely:

> "We are *not* contending here that schools are racially identifiable because of poor quality or because of substandard education. In *Swann*, the court indicated that those factors would be taken into account. We are proceeding on the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable." (Emphasis ours.)

Further, we hasten to point out to our judicial superiors that in spite of the threshold orders, we allowed the plaintiffs in the trial of their case full latitude to develop any and all such proof, as they desired, relative to those facts which they thought justified the necessity of crossing political boundaries or pointed in that direction. Such is in the record. This precaution was taken by us that the Appellate Court would have before it, fully developed, *all* of the facts at issue; that no remand for basic factual finding would be required, in the event that Court, on appeal, found our threshold position to have been legally unsound.

Likewise, some explanation of our disposition of the intervening complaint against the Anchorage School Board is deserved. In that matter we felt the dismissal of Anchorage as a defendant was required, that our ruling as to crossing political boundaries be consistent, but we took such action fully cognizant of the fact that after development of the proof before us we had the power, if deemed necessary,

to order Anchorage again made a party and thus brought back before us. The Anchorage Independent School District has a total student enrollment of only some 300 pupils. Defense of this litigation by it (and as it turns out under our holding herein wholly unnecesary) would have caused serious financial problems to that small school district.

The Sixth Circuit, on December 8, 1972, in the *Bradley, et al.* v. *Milliken, Governor, et al.*, 72-1809 and 72-1814, spoke as to the crossing of political boundaries. It withdrew that opinion on January 14, 1973, and granted rehearing en banc. Therefore, we believe, in view of the unsettled legal state of affairs as to the boundary problem, by the development of the entire factual story, we have properly met our duty, whichever way the ball bounces.

This memorandum opinion and judgment relates solely to the claims against the Jefferson County Board of Education and its superintendent.

The Present Jefferson County School System

The evidence reveals that the Jefferson County School District encompasses approximately 280 square miles, as compared with the Louisville Independent District which contains approximately 65 square miles. The number of schools being operated by the Jefferson County Board is 103, of which 74 are elementary schools, 5 are middle schools and 18 are combined junior and senior high schools. In addition thereto, the Board operates 6 special type schools, including Ormsby Village, a custodial care for children, and a reception center for juveniles. The number of pupils in the Jefferson County school system at the end of the first pupil month, September 27, 1972, was 95,856, of which 92,163 were white and 3,693 were black so that the percentage of black students to white students in the entire system is 4.01%.

Since the middle schools operated by the County Board and the senior high schools operated by the County Board

are not criticized by the plaintiffs, it is appropriate at this juncture to state that the record reveals (Exhibit II A) that in the 74 elementary schools operated by the County Board, there are 44,896 white children, 1,774 black children, or a total of 46,670 students, of which 3.8% are black. Of a total number of 4,020 teachers in the Jefferson County system, 3,877 are white and 143 are black so that the percentage of black teachers to white teachers in the entire system is 3.6%. In addition thereto, among the certified administrators at the central office of the school system which total 100, 96 are white and 4 are black, or 4% thereof.

The method of pupil assignments in the County system is dictated entirely by the capacity of the school serving a particular district. The population of pupils is studied and boundary lines drawn to include the number of pupils which can be adequately housed by the school facility. Allowance is made for future growth when possible. Natural boundaries and methods of ingress and egress to the school are taken into consideration. There is *no transfer system* within the county school system and all pupils are assigned to the schools on the basis of residence. The school attendance zones are redrawn from time to time to reflect changes in the school population and the construction of new schools.

History of Integration in the Jefferson County School System

In 1955, the year following *Brown I*, the Jefferson County Schools had a pupil population of approximately 32,000 which included approximately 1,000 Negro pupils. At that time there were approximately 1,066 teachers, of whom 36 were Negro teachers. Prior to *Brown I*, Negro elementary pupils were housed in eight buildings. One was a twenty-room modern school while the others were small, one to four-room buildings. There were no high school facilities for Negro pupils since the County school system paid tuition and transportation for Negro high school students to

attend schools for blacks operated by, and within, the Independent School District of Louisville.

Following *Brown I* and beginning in 1956, the following steps were taken by the Jefferson County Board to accomplish integration. In 1956 Orell, a two-room school was discontinued and the Negro pupils were assigned to the school in the district in which they lived. Negro pupils in grades 1 to 6 were assigned to the elementary school in the district in which they lived, while those in grades 7 and 8 were sent to Butler and Valley High Schools, predominantly white schools. At Newburg, which was an all black school prior to *Brown I* children in the 9th grade were assigned to high schools of the county and many Negro pupils living in various sections of the county that had been attending Newburg prior to *Brown I* were assigned to previously all white schools in the districts in which they lived. All Negro pupils in grades 7 and 8 in the entire county were given a choice of remaining at the all Negro school or of enrolling in the high school in the district in which they lived. All pupils entering high school (grades 7 through 12) for the first time were *required* to enroll in a county high school which had been all white previously. Pupils previously enrolled on a tuition basis at Central High School in Louisville and Lincoln Institute in Shelby County were given a choice of entering a county high school or of finishing where they were already enrolled.

In 1957, two more Negro schools were discontinued, Worthington and Jefferson Jacobs. The Negro pupils were integrated in previously all white schools in the district in which they lived. Also in 1957 all 7th and 8th graders at Dorsey, Forrest and Griffeytown were integrated into high schools in the districts in which the pupils lived. Griffeytown, like Newburg, had historically been a black community. In 1958, all Negro pupils in the 7th and 8th grades at Jeffersontown Negro School and Newburg were

integrated by transferring them to previously all white schools in the district in which they lived and thus by 1958 there had been completed by the School Board integration of all pupils in grades 7 through 12 in all county schools. Only five schools with all Negro population then remained in existence. They were Newburg, Forrest, Dorsey, Griffeytown and Jeffersontown. The total pupil membership was 286 with ten black teachers.

In 1959 Griffeytown was discontinued as a black school; in 1961 Dorsey was discontinued and all of its pupils were assigned to integrated schools in the districts in which they lived; in 1961 also, grades 4, 5, and 6 were withdrawn from Forrest and sent to the integrated Middletown school. By 1963 the final steps of total integration were completed by abandoning the two-room, all Negro school at Forrest and the four-room, all Negro school at Jeffersontown. The pupils attending these two schools became a part of the membership of the schools in the district in which they resided.

While the Newburg school remained predominantly black, all pupils living within the Newburg district were required to attend and white pupils were enrolled on several occasions.

In 1963, the first step toward faculty integration was accomplished, since teachers in the Forrest and Jeffersontown Schools, which had been previously all black, were assigned to schools which had previously had all white faculties. In 1964, additional faculty integration was accomplished by placing black teachers in two previously all white school situations. We find that 1965-66 was the year in which a serious effort was made to integrate the Newburg faculty which had previously been all black. Teachers throughout the system were asked to express an interest in joining the Newburg faculty, and as a result thereof, four white teachers were brought into the faculty

at Newburg for the 1965-66 school year. By that date there were a total of 53 black teachers assigned to nine integrated faculties.

Continued progress in faculty integration was accomplished in 1966 and 1967 so that by the conclusion of that year, there were 63 black faculty members assigned to 15 different integrated faculties (Jefferson County Board Exhibit 30).

In 1967 and 1968, 1968-69 and 1969-70 school years, there was determined progress in faculty integration so that by the conclusion of the 1969-70 year, there were 91 black faculty members in 35 integrated faculties. The school year 1970-71 was an increasingly difficult year to employ black teachers because of the competition from industry with its higher salaries and in 1970-71, through retirement and other losses, the system actually lost numerically from the standpoint of integrated faculties so that at the end of 1971, there were only 86 black teachers in 35 integrated schools.

In 1971-72 the system accomplished its goal with reference to the Newburg faculty by reducing the number of black teachers at the Newburg school from 22 to 11. The evidence is undisputed that at the beginning of the 1972-73 year, there were 143 black teachers in 81 faculties, showing a net gain of 47% black faculty members. Fifty-two (52) new black teachers were employed for the 1972-73 school year but there had been actual offers made to 70 black teachers of whom 18 (25%) apparently, after having made application in good faith, refused positions offered (Jefferson County Exhibit 30). It is definitely established that the system has experienced difficulty in attempting to recruit black teachers to the predominantly white Jefferson County School system.

Attendance Zones

In 1966 the County Board began the erection of middle schools, which are schools housing pupils in the 6th, 7th

and 8th grades, and deliberately placed such middle schools adjacent to those areas where the percentage of blacks to non-blacks is high. The middle schools increased the geographical attendance area and thereby resulted in integrating the schools more desirably. For instance, a middle school was constructed on Indian Trail and opened in September of 1971, and another was constructed on Klondike Lane and opened in September of 1972, helping to further integrate those communities. At the Bruce Middle School on Indian Trail, opened in September of 1971, there were 70 black pupils or 8% of the pupil population; and at the Meyers Middle School, located on Klondike Lane and opened in 1972, there were 14% black pupils. The erection of these middle schools resulted in removing the sixth grade pupils from the Newburg School and thus again reduced the black population in the Newburg School and increased the black population in the newly erected middle school.

Issues and Contentions

Although the allegations of the complaint and intervening complaints leveled rather broad criticism at the Jefferson County school system, the evidence introduced narrows the issues between the parties very considerably. No complaint was made concerning the high schools and middle schools in the system or of the refusal of the Board of Education to permit optional attendance areas. Counsel for the plaintiffs conceded that from a curriculum standpoint and pupil-teacher ratio standpoint, there was no substandard educational program in any of the particular schools.

In short, the plaintiffs are contending that the Board has made discretionary decisions which retained vestiges of state imposed segregation by reason of the concentration of approximately 56% of the total number of black

elementary school children in three elementary schools, Newburg, Price and Cane Run. Plaintiffs maintaining that the policy of the Board has kept the Newburg school deliberately below capacity, while nearby white schools have been overcrowded to the point of using portable classrooms and double sessions. Plaintiffs insist that the only remedy for this situation is for the Board to *transport white elementary school children* into the Newburg school in order that this school may be racially balanced and to redraw the school attendance zones and/or to pair or cluster students in the Cane Run area in order to prevent the steady increase of black children in the Cane Run school.

The Board of Education, on the other hand, contends that its efforts to decrease the size of the Newburg Elementary School, to integrate its faculty, and to distribute black children living in the Newburg community into other adjoining areas containing elementary schools which are predominantly white, as well as the addition of a middle school on Klondike Lane, represent practical and workable solutions to the Board's responsibility to do away with all vestiges of state imposed segregation. In addition, the Board pointed out consideration that has been given to redrawing school attendance zones in the Cane Run-Schaffner area in order to lessen the impact of the sudden influx of black children who moved into the Cane Run area after the school was planned and erected. Finally, the Board insists that the plaintiffs' solution of requiring the Board to transport white children by cross-busing or in a "leap-frog" fashion into the Newburg and other elementary schools would not provide any permanent solution to the continuing responsibility of the school board to maintain a unitary school system.

We shall examine these contentions and issues in the light of the evidence introduced and in accordance with the guidelines laid down by the Supreme Court.

* * * * * * * *

In the

UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville

Civil Action No. 7291-C

JOHN E. HAYCRAFT AND HAZEL K. LANE, - *Plaintiffs*

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, a body corporate, NEWMAN WALKER, Superintendent, Louisville Public Schools, BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, a body corporate, and RICHARD VAN HOOSE, Superintendent, Jefferson County Public Schools, - - - - - - *Defendants*

MEMORANDUM OPINION AND JUDGMENT—Entered March 8, 1973

This action filed June 22, 1972, was tried to the Court on December 1-7, 1972. The Court has considered the voluminous testimony, the more than 130 exhibits, which were filed by agreement into the record, and upon the entire record herein now issues its Findings of Fact and Conclusions of Law and Judgment herein.

POSTURE OF THE LITIGATION

This is a school desegregation action[1] commenced by John E. Haycraft and Hazel K. Lane against the Board of Education of Louisville, Kentucky, the Board of Educa-

[1]Sponsored by the Kentucky Civil Liberties Union.

tion of Jefferson County, Kentucky, and their respective superintendents, seeking desegregation of the Louisville School District and demanding that the Court transfer so much of the Jefferson County School District as lies within the corporate limits of the City of Louisville into the Louisville School District.

By intervening complaint, Lyman Johnson, Richard Miller, Barbara Byrd, Aaron Howard, John R. Hughes, Teresa Black, John Schmidt and Earl Alluisi sue the Jefferson County Board of Education, the Board of Education of Louisville, the Anchorage, Kentucky Board of Education, and their respective superintendents, demanding complete desegregation of the three said school districts and further that the Court order a merger of the three districts.[2]

A second intervening complaint was filed, sponsored by the American Federation of Teachers, a labor organization which claims it represents some of the teachers in all systems, demanding that the Court not arbitrarily assign teachers merely to achieve a balanced faculty.

Prior to the trial hereof, we entered certain threshold orders, to the effect that this Court lacked the judicial power to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage School Districts, and, since the Anchorage School District (a very small school district located in the northeast portion of the county) was totally white, the Court, by final order with respect thereto, dismissed all proceedings against the Anchorage School District and its superintendent.

At the same time we directed separate trials, one immediately following the other, as to the status of each of the Louisville Independent School District and the Jefferson County School District.

Succinctness dictates an explanation at this point as to our reasoning behind the aforementioned threshold orders.

[2]Sponsored by the Human Relations Commission and the NAACP.

First off, at that point in time (October, 1972), the prevailing law on the crossing of political boundaries in integration cases was as expressed in *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058. The Supreme Court of the United States had declined to advance that matter upon its docket. The Sixth Circuit has not spoken on the issue.

Though it has always been our personal judicial feeling that a situation might possibly be *envisioned*, wherein established discrimination was *so invidious* and *de jure* and further wherein the district court might be so *"locked in"* by existing political boundaries that its desegregation problem became *insusceptible of any solution other than* by the crossing of political boundary lines that such might become legally acceptable; however, an examination by us of the pleadings in the instant matter and our knowledge of the historical local situation did not support the possibility of proof of such a set of facts here, and, accordingly, we followed the Fourth Circuit rule. We believe our judgment in this regard was vindicated, for on trial date, in his opening statement, renowned counsel for the plaintiffs stated:

> "We are *not* contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the court indicated that those factors would be taken into account. We are proceeding in the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable." (Emphasis ours.)

Further, we hasten to point out to our judicial superiors that in spite of the threshold orders, we allowed the plaintiffs in the trial of their case full latitude to develop any and all such proof, as they desired, relative to those facts

which they thought justified the necessity of crossing political boundaries or pointed in that direction. Such is in the record. This precaution was taken by us that the Appellate Court would have before it, fully developed, *all* of the facts at issue; that no remand for basic factual finding would be required, in the event that Court, on appeal, found our threshold position to have been legally unsound.

Additionally, it should be noted that there was simultaneously pending on our docket, and is disposed of by another of our Opinions this very day, Civil Action No. 7045, styled Newburg Area Council v. Board of Education of Jefferson County, and Louisville Independent School District. We tried both the instant Civil Action and Action No. 7045, one immediately following the other; first, all plaintiffs against the Louisville District and then all plaintiffs against Jefferson County Board of Education. This seemed the orderly way to handle the matter.

Likewise, some explanation of our disposition of the intervening complaint against the Anchorage School Board is deserved. In that matter we felt the dismissal of Anchorage as a defendant was required, that our ruling as to crossing political boundaries be consistent, but we took such action fully cognizant of the fact that after development of the proof before us we had the power, if deemed necessary, to order Anchorage again made a party and thus brought back before us. The Anchorage Independent School District has a total student enrollment of only some 300 pupils. Defense of this litigation by it (and as it turns out under our holding herein wholly unnecessary) would have caused serious financial problems to that small school district.

The Sixth Circuit, on December 8, 1972, in the *Bradley, et al.* v. *Milliken, Governor, et al.*, 72-1809 and 72-1814, spoke as to the crossing of political boundaries. It withdrew that opinion on January 14, 1973, and granted rehearing en banc. Therefore, we believe, in view of the unsettled legal state of affairs as to the boundary problem, by the development

of the entire factual story, we have properly met our duty whichever way the ball bounces.

This memorandum opinion and judgment relates solely to the claims against the Board of Education of Louisville, Kentucky and its superintendent.

ISSUES AND CONTENTIONS

Contrary to many similar actions which have reached the federal courts, the issues in this case are somewhat narrow.

Plaintiffs, in their opening remarks to the Court, admitted that *no* child, black or white, within the Louisville Independent School District was being denied an equal educational opportunity or was being required to attend a substandard facility. Thus, plaintiffs' case admittedly is bottomed on the proposition that because racial imbalance exists in some of Louisville's schools that this equals "vestiges of a dual school system" which is required to be dismantled under *Brown I, Brown* v. *Board of Education*, 347 U. S. 483 (1954), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971).

Defendants contend, on the other hand, that *Brown I, supra*, though establishing segregation as being a deprivation of equal educational opportunity in violation of the Equal Protection Clause of the Fourteenth Amendment, did not require *every school* to reflect the racial ratio of the school district, and that Swann, *supra*, applied to *de jure* segregation, i.e., racial imbalance from discriminatory action, or inaction, of or by the authorities. Defendant concedes that once the plaintiffs have established racial imbalance in one or more of the schools (as established here) the burden is upon the defendant to come forward and show, to this Court's satisfaction, that the imbalance is not due to any invidiously discriminatory actions, or failures to act, by the Board or the State; that the imbalance results from factors beyond the authorities' control, though they have

made every reasonable and practicable efforts to maintain a unitary school system.

The contentions of the parties above-expressed, we believe to be the legal azimuth to be followed in the scope of our inquiry.

In the resolution of these contentions, we have considered testimony of the witnesses, numerous exhibits, demographic data, pupil desegregation, faculty desegregation, per pupil expenditure data, extracurricular activities, tip ratio data, whether the Louisville Board had done everything practical within its power to achieve maximum integration, whether or not a cross-transportation order would be legally required, the effect of the transfer policy, the effect of discontinuing old schools, the construction and addition of new schools, state action and the Board minutes since the commencement of the Board's desegregation efforts.

* * * * * * * *

GENERAL FACTS

The defendant Board of Education of Louisville, Kentucky is a body corporate, organized and existing under the laws of the Commonwealth of Kentucky (KRS 160.160). It is situated within the City of Louisville, a city of the first-class within Jefferson County, Kentucky. It manages and controls all of the public elementary, junior high and high schools within a geographical area known as the Louisville Independent School District. Its boundaries are not coterminous with the City of Louisville, Kentucky, and approximately 10,000 children live between the boundaries of the Louisville Independent District and the outer boundaries of the City of Louisville, Kentucky and attend the Jefferson County school system. Under Kentucky law, an independent school district's boundaries do not expand with the boundaries of the city by which it is embraced. (*Spragens* v. *Thomas*, 308 Ky. 97, 213 S. W. 2d 452.)

The school district is composed of four roughly identifiable areas known as the east end, central area, west end, and the south end. The south and east end are mostly populated by the white population while the west end is largely populated by the black population with a mixture of both in the central area. (See Exhibit 85). Formerly, the black population resided in the central area of the city, but after urban renewal (late 1950's and early 1960's) a large majority of the black population moved to and settled in the west end of the Louisville District. (See Exhibits 81, 82, 83 and 84). Louisville did not provide transportation for students before *Brown I*[3] and does not now.

At the commencement of the 1972-73 school year, the Louisville Board operated some 75 schools. The grade structure runs from kindergarten (kindergarten is not included in data) to grade twelve. There are nine high schools, two of which are vocational schools and one of which is a residential manpower center located at the old Lincoln Institute in Shelby County, Kentucky. There are thirteen junior high schools and forty-seven elementary schools. In addition, there is a three-level school located at the Brown Education Center at Fourth and Broadway designed for those children who showed some penchant toward excelling in creativity. This latter school, opened at the start of the 1972-73 school year, draws children from throughout the district.

As to the high schools (See Exhibit 88), Atherton, Iroquois and Shawnee are located in separate attendance zones; Male, Manual and Central are located in a common attendance zone (they being in closer proximity to one another) Ahrens (the new vocational school) and the Brown Education Center School have district-wide attendance zones. All of the junior high schools and all of the elementary schools have separate attendance zones and districts. (See Exhibits 86 and 87).

[3] *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954).

The total enrollment in the Louisville Independent District at the commencement of the 1972-73 school year was 45,570. White students constituted 22,637 of that total and black students 22,933. During the 1956-57 school year, there were 45,841 children enrolled, of which 12,010 were black and 33,831 were white. Thus, from 1956 to the present time, the white enrollment has decreased by approximately 11,000 pupils, and the black enrollment has increased by the same number. From 1956, the total school population increased from 45,841 until it peaked in 1967 at 51,262; thereafter, it began to decline until it reached the present population of 45,570.

Although black children constitute just over 50% of the total enrollment in the Louisville School District, the total citizen population of the District is approximately 23% black and 77% white. Over forty per cent of the children in the District system come from poverty level families with most of these (80%) being black.

The Louisville system has approximately 2,200 faculty members of whom 36% are black. Forty per cent of the system's central administrative staff is black.

The Louisville Board itself is composed of *three whites* and *two blacks*, all of whom *are elected at large* from within the Louisville Independent School District, a district in which white citizens outnumber black citizens 3 to 1; a strong indication to us of no manifest racial prejudice against blacks playing a viable role in the operation of the District School System. There has been black representation on the Louisville School Board since 1959.[4] An examination by us of the School Board minutes does not reflect any racial disharmony or polarization among the members of the Board.

• • • • • • • •

[4]Since the election of Hon. Woodford Porter in 1959, he being subsequently reelected and serving as Chairman of the Board 2 years and 7 months during his terms of office.

ASSIGNMENT PLAN

The student assignment plan used by the Louisville Board is described as a geographic zone plan with provisions for a transfer if there is room in the school to which the transfer is sought. This is not a warmed-over version of what the north calls "open enrollment" and the south calls "freedom of choice." Nor is it a neighborhood school plan in its entirety.

Zones are established to meet the needs of a surrounding community area as the need relates to the capacity of the school. There is no evidence in this case that the Board's student assignment plan or its method of establishing school attendance zones has contributed to the racial imbalance that exists in some of the Louisville schools. To the contrary, the latest figures reflect a negative differential of .07%, which means that 32 children are involved out of the total number of 4,000 children, who last school year applied for and received transfers. To put it another way, if one subtracts the number of students who transferred from a majority to a minority race situation from the number of students who transferred from a minority to a majority race situation, there is a net loss of 32 children in a more racially balanced situation out of more than 4,000 transfers. Plaintiffs presented no evidence to the contrary; aside from one of their witnesses, Neville Tucker, a former black Board member (from 1967-69) who thought it might have contributed to a greater racial imbalance, but who weakened as to how or why it did so, and then stated that *it was the Board's intention to achieve maximum integration under the transfer plan.* The Court so finds.

• • • • • • • •

ATTENDANCE ZONES

Insofar as the establishment of the attendance zones is concerned, the Court finds, and it is amply demonstrated by the demographic data, that the school population reflects the neighborhood. If the neighborhood is 76 to 100% black, the school will be 76 to 100% black. If the neighborhood is 0 to 25% black, the school will be 0 to 25% black. Specific testimony was given to those schools who before *Brown I, supra,* were black and are predominantly black today. In each instance, these schools *at some time in their history* since *Brown I, supra,* have had members of both races in attendance.

High Schools: Traditionally, long before *Brown I, supra,* the Louisville District had operated four high schools: three in the central portion of the City, they being Male High School, for those seeking a pre-college course; Manual High, for those seeking technical training; and Central High, which served the black population; and the fourth, Shawnee, in the west end, a girls' white high school. These schools had been erected in the center of the population areas they served.

As Louisville grew in population, the expansion was to the east, to the south, and to the southeast, requiring east-end and south-end high schools to be sorely needed. Thus, Atherton High School, as it is now constituted, was constructed in 1961 in the southeastern part of the City, but beyond the boundary of the Louisville Independent School District. In 1967, a junior high school (Gottschalk) was converted into a high school in the extreme southern part of the District and designated Iroquois High.

Central High School located in the central portion of the City is traditionally a black high school, having been such before *Brown I, supra.* A new Central High School was constructed in the year 1950. It is a prestigious and academically oriented school. Few white pupils have attended Central since Louisville's desegregation plan was put into operation in 1956; in fact, there are none there now. Before the year 1971, Central had a city-wide attendance zone as it offered specific programs not offered at other high schools. Since 1971, it has shared a common attendance zone with Male High School, 95% black, and Manual High School, 63% white. Central does have a biracial faculty (43% white), and its administrative leadership is biracial. A majority of the black students who attend Central come from the central zone, as reflected on Exhibit 85.

During the 1968 investigation by HEW of the above-referred to NAACP complaint, particular attention was paid to Central High School. At one stage of the HEW inquiry consideration was given to the suggestion that Central be paired with Ahrens Trade School and transportation between the two be furnished. Surprisingly, this suggestion was objected to by the NAACP (a sponsor in this litigation now before us) on the ground that if such pairing was done Central *would lose its identity.* Such objection did not, in and of itself, prevent the suggestion from being placed in operation, as there were meritorious reasons advanced and problems confronted which led to the final HEW conclusion that such would not be feasible. Those in the main being that vocational courses could not be installed at Central, designed for academic endeavors, without expensive and extensive remodeling, renovation, and that Ahrens lacked facilities for proper academic instruction, it having been initially designed in 1956 as solely a vocational institution. At that same time a rigid zone for Central was considered but it would not have appreciably resulted in any better racial balance at Central and would have, in fact, had no effect on the balance at Male High School, and would have widened the imbalance at Manual High School. HEW discarded this plan and did not recommend it. Another suggestion was considered by

HEW at that time, of pairing Central with Manual, but it was found that that would result only in widening the breach of racial balance at Manual. HEW gave no thought of pairing Central with Iroquois for everyone seemed to agree and we find, as hereinafter will be demonstrated when we discuss Iroquois, that such would have achieved no lasting balance and distance (approximately 6½ miles) was a very important factor.

Atherton High School as it is now constituted is located in the southeastern part of the City of Louisville, but outside the Louisville District. New Atherton was constructed in 1961, after seventeen (17) separate sites were considered before settling on a location that would meet state regulations and provide the necessary space. Atherton had formerly been located in the building now occupied by Woerner Junior High School. See Exhibit 87. After the new Atherton High School was opened more blacks attended the new facility than had attended the old facility on Morton Avenue, though it is predominantly white (97%). In fact, attendance figures and the movement of more affluent blacks to the suburbs seem to indicate more blacks will enter this school every year. (Exhibit 62). The attendance zone remained the same as before *Brown I, supra.* We find that the construction of new Atherton was not undertaken nor designed to perpetuate a dual system or to create a racial imbalance.

Iroquois High School, after opening in 1967, had its attendance zone modified in 1971, and moved further away from Manual, thereby requiring more whites to attend Manual and thus maintaining a better racial mix at Manual High School. Iroquois' present mixture is 99% white; however, it must be noted that it is located in an area with few, if any, black inhabitants and a great distance from all other high schools. Exhibit 88.

Male High is a startling example of how population shifts can affect the racial composition of a school. In

1956, it had an enrollment of 1,142 whites and 63 blacks. By 1966, the enrollment was 681 whites and 845 blacks. In 1972, the enrollment was 45 whites and 1,396 blacks.

For the purpose of this case it must not be overlooked that the same neighborhood racial pattern exists, due to population migration. The change in student body composition at Male was not the effect of any zone or attendance district modification by the defendant school board.

The original *Shawnee,* a white girls' high school, became co-educational in 1950-51 and was, until 1962, housed in the present Shawnee Junior High School facility. In 1962, a new Shawnee Senior High facility was built adjacent to Shawnee Junior High, the former facility having become inadequate for a large senior high and a large junior high. In 1968, an addition was added to Shawnee Senior High to accommodate the still growing student population.

The geographic zone for Shawnee Senior was changed before the commencement of the 1971-72 school year, and the ninth grade was added to the Senior High because Shawnee Junior High was overcrowded. The present zone for Shawnee Senior is generally west of Thirty-fourth Street on the east, the Ohio River on the north and west and the Louisville District line on the south. The zone change did not impede desegregation because the next high school to the east is Central. The zone change did result in white children, formerly in the Shawnee district, becoming eligible to attend Central. Traditionally, however, the white children who live in the Portland area (the extreme north-west portion of the district), a predominantly white area, have generally attended Ahrens Trade School (with a present ratio of 30% black and 70% white) for vocational training.

Following the Louisville District's desegregation plan, the Shawnee has had an increasing number of black students every year. In 1956, there were 835 white students and 47 black students. The number of black students con-

sistently increased for the next ten years, creating a majority black situation for the first time in the school year 1966-67, when there were 648 whites and 743 blacks. The number of blacks at Shawnee has continued to increase since the 1966-67 school year where today Shawnee has 49 whites and 908 blacks. The changing student population corresponds with changing racial housing patterns caused by the white exodus from the west end of Louisville.

The Court finds that the zone change at Shawnee in 1971 was not designed to, nor did it, impede desegregation. Moving the line east would only have had the effect of taking eligible white children from the Central district and moving it farther west would only take whites from Shawnee, already then 89% black. The Court finds that there were no racial schemes in the establishment of this new zone line; that it was changed in order to establish a zone for Central and take care of the crowded situation in Shawnee.

Manual High, which shares a common attendance zone with Central High and Male High, experienced in this 1972 school year an enrollment of 993 whites and 589 blacks—yet just five years ago its student population was 1,111 whites and 281 blacks. Thus, we see that even with the infusion of more whites into Manual High from a movement south of the north line of the Iroquois High attendance zone, that Manual, due to population change and movement, with or without the tip ratio, is, in spite of all the Board has done, or can do, short of transportation, becoming rapidly predominantly black in student makeup.

We find that there has been no "gerrymandering" of attendance zones, and that such attendance zone changes as have been made were directed toward better racial balance. We find no invidious discrimination or *de jure* acts on the part of defendant School Board that have contributed to the regrettable racial imbalance.

Junior High and Elementary Schools. In an examination of these types of schools we again discover the like patterns of racial imbalance as was experienced in our analysis of the high schools. DuValle, with 4 whites and 842 blacks in its student body, is located in the southwest portion of the city, in an area that is almost totally black in citizenship. There are no contiguous junior high school zones, nor any junior high school zones within reasonable proximity, for which pairing would be viable and lasting. Cotter Elementary occupies the same plant as DuValle and experiences the same population pattern. Meyzeek Junior High with 1 white and 336 blacks, and Washington Elementary occupy the same plant in the central portion of the city in an area known as Smoketown, which is almost totally black in citizenship. Here again we find no contiguous zones by which racial balance would be improved by pairing. The two closest junior high schools to Meyzeek, i.e., Manly and Woerner, with student racial populations of 363 whites to 646 blacks and 495 whites to 345 blacks, respectively, reflect that a pairing with ~~either of~~ these schools would be counterproductive, even if one disregarded distance and traffic conditions; for if the pairing be with Manly the result would still be a three to one ratio black, and if the paring be with Woerner, the result would be about the same ratio as Woerner possesses anyhow, i.e., 50-50.

Russell Junior High School, with a present student population totally black, and Western Junior High School, with 939 whites and 319 blacks, have contiguous zones. In 1962, Western became overcrowded and to handle the school population the zone was moved closer to Western. Before this change was made, the defendant Board of Education involved the NAACP and the neighborhood and all other persons who evidenced an interest, and the change was effected without objection. We have taken a good hard look at this action, for offhand it appeared that perhaps it would

not stand close scrutiny. We learned, however, that Western serves a black and white area and even the moving of the zone by this Court back toward the Russell school, from whence it was taken, would not infuse additional whites into Russell which is all black and would cause more blacks to attend Western, thus bringing into play the "tilt" and, therefore, be of no lasting consequence. As to all of which, when viewed in the light that the change was made without objection by all interested parties, there appears nothing discriminatory nor *de jure* with respect thereto.

We likewise closely examined a certain complaint about the location of the new Martin Luther King Elementary School, at the time it was in its planning stage. One board member, at least, felt very strongly that King should or could be paired with Shawnee Elementary School under the Princeton Plan. The black population objected and the sponsoring Negro board member, Judge Tucker, one of plaintiffs' witnesses herein, threatened to resign from the board because of the protest. Judge Tucker admitted, however, that the board was willing to attempt the pairing to secure a better balance. This activity took place about 1967. The schools were not paired and by the time King was opened in 1968 both it and Shawnee were predominantly black, 183 whites to 664 blacks, and 288 whites to 438 blacks. So it can be seen that the pairing would have been ineffective insofar as securing any lasting racial balance was concerned, for by 1972 population movement gave King a student population of 23 whites and 907 blacks, and Shawnee Elementary 97 whites and 804 blacks. Nothing lasting was possible.

We find that the junior high school zones and elementary school zones were established and created to serve the neighborhood community in which the particular schools were located, and were not established with any notion or purpose of invidious discrimination, nor to create a dual

school system. In fact, the various zone changes and/or establishment achieved in every instance either more integration or had no negative effect toward racial balance, save one, i.e., the Russell—Western zone above-discussed.

* * * * * * * * *

CONCLUSION

We have examined and viewed the evidence in this entire matter "from its four corners."

No one can seriously dispute that the Louisville Independent School District moved with dispatch and diligence to integrate its schools and faculty following *Brown I*, as evidenced by what in fact did occur, as hereinabove factually found by us.

Likewise, no one can seriously dispute that during the ensuing years, particularly since 1965, regrettable racial imbalance did indeed begin its catena; however, such imbalance did not germinate from, nor has it proliferated from, any acts or failures to act by school or state authorities. The proliferation has been the result, in spite of efforts of resistence by the defendant Board, of white flight, neighborhood housing patterns and socio-economic factors; not *de jure* acts or failures to act.

So we come to the legal determination of whether or not, under these facts, the adoption by us of "the useful tool of transportation," its expense, inconvenience and accompanying problems, is constitutionally mandated of us, merely and solely for the purpose of obviating racial imbalance, (keeping in mind that in this case plaintiffs made no contention of inequality of schools or substandard education or instruction). We think not.

Brown I, supra, required the dismantling of dual school systems and the creation of unitary school systems. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), however deals quite especially with the duty of

school authorities to eleminate racially separate schools maintained by state action and the powers of federal courts to order such measures as are necessary to effect complete desegregation immediately. We interpret the *Swann* opinion to pronounce that the federal court is precluded, by Title 4 of the Civil Rights Act of 1964, 42 U.S.C. Section 2,000c, and by unanimous opinions of the Supreme Court, from imposing upon school authorities the affirmative duty to cure racial imbalance in situations where that imbalance *is caused by the de facto conditions.* Conversely, we believe that it is apparent in *Swann, supra,* that it is the duty of school boards to come forward with a plan that promises realistically to work in those cases in which it can be demonstrated that there are vestiges of state imposed segregation maintained by the boards' action, policies or inactivity. *Swann* plainly teaches that school authorities may indeed have the power to formulate and implement educational policy which would include a prescribed ratio of black to white students reflecting the proportion for the district as a whole. But *Swann, supra,* page 16, says plainly:

> "To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a Federal Court."

Recognizing as we do that schools predominantly of one race in a district of mixed population require close scrutiny to determine that school assignments are not part of state enforced segregation, we nevertheless recognize that the Supreme Court determined the existence of some small number of one race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law.

We find that the school officials have been aware of the responsibilities imposed upon them by the advancing state

of the law as it has developed by the courts since *Brown I.* We find that they have undertaken to comply with the letter and the spirit of the law and that there is not at this time any constitutional violation of the rights of the plaintiffs or any other children in the defendant Louisville school system *and that the system is a unitary system.*

From what we have said hereinabove, it follows that we need not consider further the principal claims that there can be no complete elimination of vestiges of state imposed segregation in the Louisville system unless such system is merged in whole or in part with the Jefferson County system.

• • • • • • • •

(s) James F. Gordon
United States District Judge

Dated: March 8, 1973

Copies to:
Counsel of record.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 76-2301

John E. Haycraft, Et Al. - - *Plaintiffs-Appellees*

v.

Board of Education of Jefferson County, Kentucky, Et Al. - - *Defendants-Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Decided and Filed August 23, 1977

OPINION

Before: PHILLIPS, Chief Judge, and PECK and ENGEL, Circuit Judges.

PECK, Circuit Judge. This latest aspect of the Louisville school desegregation case commenced in May of 1976, when District Judge Gordon conducted hearings concerning implementation of the July 30, 1975, desegregation plan and order approved by this Court in *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976).

As a result of the May 1976 evidentiary hearings, Judge Gordon determined that the pupil population ratio in at least 28 elementary schools did not satisfactorily reflect the racial guidelines set forth in the July 30, 1975, desegregation order. Appellants do not dispute this finding on

appeal. Having found that "the elementary school system in Jefferson County has *never* been in compliance with this Court's desegregation decision," and that this failure of compliance rendered the case outside the scope of *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), the district court, on August 2, 1976, entered an amended order, which *inter alia*, altered the pupil assignment methodology of the July 30, 1975, desegregation order by requiring the busing of an additional 900 black pupils.[1] The Board of Education of Jefferson County appeals from this August 2, 1976, amended desegregation order.

On appeal the Board of Education maintains that the district court exceeded its remedial powers in amending the plan without making any determination that the racial imbalance in these 28 elementary schools resulted from any additional segregative action on the part of the Board. This is, appellants argue, the precise issue resolved by *Pasadena*. We do not agree.

In the *Pasadena* case, the district court entered a desegregation order on January 23, 1970, requiring assignment of students in such a manner that no school within the district would have a majority of minority students (the "no majority" requirement). Only during the 1970-71 school year was the "no majority" requirement met. Thereafter, in 1974, the Board of Education sought to be relieved of the "no majority" requirement and the district court denied its motion. The Supreme Court reversed the decision of the district court, quoting *Swann* v. *Board of Education*, 402 U. S. 1, 31-32 (1971):

---

[1] In this amended order, the district court also approved the report of a Special Committee, appointed May 6, 1976, and in conformity therewith, ordered implementation of procedures for hardship transfers and ordered the school board to keep open five elementary schools scheduled to be closed; and adopted the Board's recommended voluntary transfer plan.

"Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished* and racial discrimination through official action is eliminated from the system." *Pasadena, supra* at 436 (Emphasis added).

We conclude that the district court correctly determined that *Pasadena* is distinguishable from the instant case. This case is in the pre-compliance rather than the post-compliance stage of implementation of *Pasadena*. As the Supreme Court has held "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Board of Education, supra* at 15. We agree with the district court's conclusion that nothing in *Pasadena* restricts its remedial powers so as to preclude modification of the student assignment portion of a desegregation plan, which had *not*, as of the time the modifications were ordered, brought about the desegregation of the school system. See, *United States* v. *Seminole County School District*, ____ F. 2d ____ (No. 76-2749, 5th Cir., June 13, 1977).

The judgment of the district court is affirmed.